IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

WRIT PETITION NO. 4761 OF 1997.

1. M/s Silver Jublee Dryers and Cleaners.

2. Shri Joe Vincent Fernandes, since deceased through his heirs and legal representatives-

2A. Rajiv Joe Fernandes

3. Shri Vincent Joihn Fernandess, since deceased thriough his heirs and legal representatives i.e. Petitioner Nos. 2A,4,5,6 and 7 herein.

4. Mrs. Usha Joe Fernandes.
5. Lily Vincent Fernandes.
6. Julient Vincent Fernandes.
7. Oliver Vincent Fernandes.

..Petitioners.

V/s.

1. Hiralal Nemichand Shah.
2. Maniklal Nemichand Shah. ..Respondents.

Shri V.S. Gokhale for the petitioner.
Shri Vineet B. Naik for the respondents.

CORAM : V.C.DAGA, J.

DATED : 22.9.2006.

JUDGMENT:

. This petition is directed against the judgment and order dated 11.7.1997 passed by the 9th Additional District Judge, Pune, in Civil Appeal No. 290/1991, confirming the judgment and order dated 12.4.1991 passed by the Principal Judge, Small Causes Court, Pune, in Civil Suit No. 1001/1988, dismissing the suit filed by the plaintiff to

recover possession of the suit premises from the defendant and directing enquiry regarding mesne profits, in accordance with provisions of Order 20 Rule 12 of the Code of Civil Procedure Code.

Background Facts:

2. The undisputed background facts brought on record is that one Shri Jivraj Bapuchand Gujarathi was the original owner of the suit property. He had one sister by name Smt. Sonubai Bhalchand Doshi and wife Smt. Putalabai,

3. It appears that Sonubai had adopted a son by name Shri Nemichand Bhaichand Doshi, who had two sons by name Hiralal and Maniklal i.e. original plaintiff Nos. 1 & 2.

4. It further appears that, aforesaid Sonubai, by will dated 30.11.1968, bequeathed the property of which (Shop) premises formed part; which admeasures (approx.) 190 sq.feet. with back yard admeasuring 100 sq.ft at House No. 331, Sachapir Street, Pune-411 001 (the 'suit premises'), in favour of her grand sons, the present plaintiffs.

5. Factual matrix further reveals that Smt. Putalabai had also adopted one Shri Ashok Mahale as

her son. She had filed Civil Suit No. 1242/1946 on 22nd July, 1946 against Sonubai claiming that the suit property belonged to her and she was the widow of Late Jivaraj Gujarathi. On 30.6.1948 the suit was dismissed. Appeal carried therefrom being Civil Appeal No. 268/1950 by Putalabai was allowed as a result thereof, Putalabai was declared as owner of the suit property.(Ex.185).

6. It further appears that on 18.4.1963, one more suit being Suit No. 370/1963 came to be filed at the instance of Smt. Sonubain against Smt. Putalabai's son Shri Ashok Mahale for a declaration that he is not a legally adopted son and that she was the only heir of Putalabai (Ex.106). The said suit came to be dismissed on 15.1.1965 (Ex.174). Appeal carried therefrom being Civil Appeal No. 220 of 1965 filed Sonubai came to be allowed by judgment and order dated 23.2.1967 (Ex.91); that is how, Smt. Sonubai came to be declared as legal heir of deceased Putlabai by first appellate Court.

7. It further appears that sometime in the year 1967; Shri Ashok Mahale filed Second Appeal No. 447 of 1967 in this Court challenging above decree. The said appeal was admitted by this Court. On 9th October, 1974 Sonubai died. Since no legal heirs were brought on record after Sonubai's demise, the

Second Appeal was dismissed as abated, with the result decree passed by first appellate Court in Appeal No.226/1965 came to be confirmed.

Facts leading to present litigation:

8. The cause for the present litigation is the notice dated 22.5.1988 issued by plaintiffs terminating tenancy of the tenant defendant No.2 (Ex.72) under section 106 of the Transfer of Property Act to and calling upon him to hand over vacant possession of the suit premises. The defendant No.2 replied the said notice by his reply dated 7.6.1988, denying relationship of landlord and tenant and questioned title of of the plaintiffs (Ex.73). The plaintiffs again replied to the defendants' reply contending that he was liable to be evicted since he had denied title of the plaintiff and, thereby he had forfeited his right to be a tenant of the suit premises and consequent protection of Bombay Rent Act.

9. The defendants again replied plaintiffs letter on 26.7.1988 reiterating denial of the title of the landlords/plaintiffs.

10. The aforesaid attack and counter attack resulting in denial of title, ultimately led to a

suit being Civil Suit No.1001/11988 for eviction on the ground of disclaimer of title, nuisance, reasonable and bonafide requirement of the plaintiffs- landlords.

11. The Judge of the Small Causes Court, Pune, was pleased to decree the suit only on the ground of disclaimer of title vide its judgment and order dated 12.4.1991. The aforesaid judgment and decree or order was a subject matter of Civil Appeal No. 290/1991 preferred by the petitioners-appellants original defendants before the District Judge Pune. The District Judge by judgment and order dated 11.7.1997 dismissed the appeal, with the result, decree for eviction passed by the trial Court came to be confirmed; that is how; the petitioners-defendants have suffered concurrent findings of fact at the hands of the courts below.

12. Being aggrieved by the aforesaid judgment and decree passed by the Courts below petitioner has invoked writ jurisdiction of this Court under Article 227 of the Constitution of India.

Submissions:

13. Shri Gokhale, learned Counsel appearing for the petitioners submitted that decree for eviction passed in this case is erroneous and is liable to be

set aside. He submits that the suit premises were originally owned by Shri Jivraj Bapuchand Gujarathi (Doshi). In his submission, Hiralal and Maniklal, are not original landlords. The premises were never taken from them on rent by defendant No.3. That the very fact that the plaintiffs are claiming to be heirs of Sonubai, makes itself clear that they are claiming derivative title. In his submission, prohibition under section 116 of the Evidence is against denial of title of original landlords and not of those who claim derivative title. He thus submits that denial of of derivative title cannot result in forfeiture of tenancy. Shri Gokhale in support of his submission, placed reliance on the various judgments, one of such judgments is of the learned Single Judge of this Court in the case of **Lena Periera vs. Mary Boirachok 1991 Mah.L.J. 761** and also that of Apex Court in Subhash Chandra vs. Mohammad Sharif (1990) 1 SCC 252; Mangat Ram vs. Sardar Meharban Singh (1987) SCC 318; D.Satyanarayana vs. P. Jagdish (1987) 4 SCC 424; Tej Bhan Madan vs. II Addl.District Judge & ors.
(1988) 3 SCC 137.

14. Shri Gokhale also urged that denial of title of the landlord was not a ground for eviction of tenant available under the Bombay Rent Act. He further submits that in the case in hand denial of

title was neither made foundation of suit for eviction at any stage of proceedings the said issue was raised in the said suit between the parties.

15. Shri Gokhale tried to impress upon this Court during the course of hearing that denial of title does not mean denial of derivative title of the landlord. According to him, disclaimer of title of landlords was always understood to mean denial of title of the original landlord or owner. He, thus, submits that the impugned judgment, order and decree being erroneous in law is liable to be quashed and set aside.

16. Per contra, Shri Naik, learned Counsel for the respondent submits that under the scheme of the Rent Act; section 13 prescribes certain grounds for eviction available to the landlord to see seek recovery and possession of the tenanted premises. In his submission, the legislation, mandates that if the landlord is able to establish any of the grounds mentioned under section 13; then only he is entitled for decree of eviction. He submits that on the other hand, section 12 of the Bombay Rent Act casts an obligation upon the tenant to observe and perform the condition of tenancy. Unless the tenant complies with this requirement, he cannot get benefit or protection of the provisions of the

Bombay Rent Act.

17. Shri Naik submits that a conjoint reading of sections 12 and 13 of the Bombay Rent Act shows that so long as the tenant pays or he is ready and willing to pay the standard rent and permitted increases and observe and perform the other conditions of tenancy which are consistent with the provision of the Bombay Rent Act; he cannot be evicted from tenanted premises irrespective of what the Transfer of Property Act provides. It, therefore, follows that acceptance of the relationship of landlord and tenant is both implicit between parties. In otherwords, a tenant, who disclaims or denies his landlord's title is liable to be evicted on the ground that he has disclaimed or denied his landlord's title. In the submission of Shri Naik, such a ground is consistent with the provisions of the Bombay Rent Act because acceptance of relationship of landlord and tenant leads to the applicability of the provisions of the Rent Act, qualifies the tenant to claim protection of the Act to the exclusion of section 111 of the Transfer of Property Act; under which he would be otherwise liable to be evicted. He submits, as soon as the tenant denies the title of his landlord; who has demised the premises to him or with whom he has a privity of contract and sets up in himself or in

someone else a title to the property, one can unhesitatingly say that he has not observed the most basic and fundamental conditions of the tenancy as such entitled to the umbrella of Bombay Rent Act.

18. Shri Naik further submitted that any protection of the claim under the provisions of the Rent Act flows from the basic fact that the tenant accepts the relationship of landlord and tenant. The moment he denies it; he must be held to have committed breach of the most essential condition of tenancy which qualifies him for protection under section (i) of section 12 of the Bombay Rent Act.

19. Shri Naik further submitted that in the present case it has been conclusively established on the basis of documentary evidence that the father of the tenant was put in possession of the premises by Smt. Sonubai. He submitted that after the demise of Sonabai in view of the fact that she had bequeathed the suit premises to her grand sons; the tenancy was attorned; and, it has been proved on evidence that the defendants continued to pay the rent to the present plaintiffs till 1988 i.e. till the date of filing of the subject suit. Therefore, keeping in mind all these aspects the defendants-tenants were clearly estopped from denying the title of the present plaintiffs as

landlords of the suit premises. Consequently, decree of eviction suffered by the petitioners-tenants cannot be faulted with.

20. Shri Naik further submitted that another glaring piece of evidence is the affidavit of defendant No.2, dated 14th January, 1988 (Exh.105) duly proved in evidence, wherein the defendant No.2 has unequivocally accepted the plaintiffs as the landlords. This fact coupled with rent-note dated 15th November, 1945 executed by Defendant No.3 in favour of Late Sonubai clearly established that the defendant No.3 had obtained the premises on rent for his business of running drycleaners. In the submission of Shri Naik, this clearly belies the contention of the defendants-petitioners that the plaintiffs were not the landlords. He submits that both the Courts below have examined the evidence in detail and have arrived a the correct conclusion, therefore, no interference by this Court in its extra ordinary jurisdiction under Article 227 of the Constitution of India is warranted. He, thus, prayed for dismissal of the petition.

Consideration:

21. Before considering rival submissions it is

necessary to turn to rival pleadings in the trial Court. If one turns to plaint allegations, the pleadings in the plaint are as under:

> (1) The property bearing House N. 331 Sachapir Street, Pune, originally belonged to one Sonubai Bhaichand Doshi who died in the year 1971 leaving behind her a duly executed will though which the said property developed upon the plaintiff are the superior holder i.e. the owner of the said whole property.
>
> (2) .....
>
> (3) The said premises was leased in the name of the defendant No.1, the proprietor of which was the defendant No.3. The said premises was left the purposes of laundry alone, which was being conducted by the defendant No.3 in the name of the defendant No.1. However, it seems that at present the said business of defendant No.1 is owned by and run by defendant No.2. For all purposes, in various records, the defendant No. 2 has been shown to be owner of defendant No.1. The said premises was let at the rent of Rs.25/- per month, the tenancy month since beginning commences from first day of each gregorian calendar month and expires on the last day of the same month. The defendant No.1 through the defendant No.2 has paid the rent in advance to the plaintiff upto the end of December 1988 by money order."

22. Aforesaid allegations were denied by respondent Nos. 3, 5 and 6 by filing written statement; whereas defendant Nos. 2 and 4 have filed their separate written statement. Pleadings in the written statements are more or less identical. For the purposes of deciding this petition, common and identical pleadings which are

relevant are reproduced hereinbelow.

> "These defendants do not admit that the property bearing House No. 331 Sachapir Street, Pune 1 originally belonged to the Sonubai Bhaichand Doshi, who is said to have died in the year 1971. These defendants do not admit that the said Sonubai executed will. The defendants do not admit that any property or suit property developed upon the plaintiffs. Further allegations that the plaintiffs are the superior holders (i.e. the owner) of the said whole property are not true. Assuming but not admitting that title of Sonubai, the plaintiffs can have no cause of action and cannot file a suit in respect of the property without obtaining a probate from the Court of competent jurisdiction. The present suit is not entertainable without probate and as such it is liable to be rejected by this Hon'ble Court."

23. with the aforesaid pleadings on record, the trial Court was pleased to frame issues. Two of them relevant to the question raised read as under:

Issues

> (4). Whether it is proved that the plaintiffs are the landlords of the suit premises.
>
> (5). whether it is proved that the defendant No.2 has denied the title of the plaintiffs with respect to the suit premises and as such, the plaintiffs are entitled to claim possession of the suit premises?

24. Parties to the suit led oral as well as documentary evidence before the trial Court. It is not necessary to discuss the entire evidence brought on record. However, it is relevant to note that the tenant- one of the present petitioners - Shri Joe

Fernandez, had filed affidavit before the Cantonment Authority on 14.1.1988 to get electric connection. He had stated therein that the premises being House No. 331 at Sachapir Street, Pune-1 belonged to Maneklal Nemichand Doshi. The said premises were let out to him by the said person, and that he was monthly tenant of the said premises since 1935, paying rent @ Rs. 30/- p. m. This affidavit is produced by the plaintiffs. The same was proved. It came to be exhibited as Ex. 105.

25. Money order receipts more than 17 in number are available record, which are marked as Ex. 53 to 56 (colly.); evidencing payment of rent by Shri Joe Fernandes to the present plaintiff respondents herein.

26. One of the petitioners Shri Joe Fernandes has also written one letter to Shri Hiralal Nemichand Doshi, one of the plaintiffs, wherein he had admitted that Hiralal was the landlord and that Hiralal had been remitting rent to him as a tenant. The said original letter is available on record of the trial Court and marked as Ex.9.

27. At this juncture, it will not be out of place to mention that Shri Gokhale on the basis of the evidence on record urged that the present

plaintiffs were not original landlords and, therefore, for taking advantage of doctrine of forfeiture what is required is: denial of title of the original landlord and not of the person who becomes landlord on the basis of derivative title. As against this, Shri Naik urged that having accepted the present plaintiffs as landlords and having acted upon the said relationship by remitting rent, coupled with other evidence, it was not open for the tenant-petitioners to deny title of the plaintiffs. According to him, even the cases like one in hand have also been covered under section 116 of the Evidence Act.

28. In order to consider the above rival submissions, it is necessary to take survey of the well settled legal principles enunciated from time to time and presently holding the field.

29. The Apex Court in the case of Sheela vs. Firm Prahi, AD Rai Prem Prakash (2002) 3 SCC 375 has ruled as under:

> . "After the creation of tenancy if the title of landlord is transferred or devolves upon a third person the tenant is not estopped from denying such title. However, if the tenant having been apprised of the transfer, assignment or devolution of rights acknowledges the title of transferee either expressly or by paying rent to him, the rule of estoppel once again comes into

operation for it is unjust to allow the tenant to approbate and reprobate and so long as the tenant enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor is? (See Tej Bhan Madan v. II ADJ (1988) 3 SCC 137).A denial of title which falls foul of the rule of estoppel contained in section 116 of the Evidence Act is considered in law a malicious act on the part of the tenant as it is detrimental to the interest of the landlord and does no good lease to himself. However, it has to be borne in mind that since the consequences applying the rule of determination by forfeiture of tenancy as a result of denial of landlord's title or disclaimer of tenancy by tenant are very serious, the denial or disclaimer must be in clear and unequivocal terms. (See: Majati Subbarao v. P.V.K. Krishna Rao, (1989) 4 SCC 732, Kundan Mal vs. Gurudutta, (1989) 1 SCC 552 and Raja Mohammad Amir Ahmed Khan, AIR 1965 SC 1923. We may quote with advantage the law as stated by a Division Bench of the Calculla High Court in Hatimullah v. Mohd. Abdju Chowdhury AIR 1928 Cal.312. It was held:

. " The principle of forfeiture by disclaimer is that where the tenant denies the landlord's title to recover rent from him bonafide on the ground of seeking information of such title or having such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the landlord's title. But where the disclaimer is done not with the object but with an express repudiation of the tenancy under the landlord, it would operate as forfeiture."

. In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of clause (c) of sub-section (1) ofsection 12 of the M.P. Accommodation Control Act, 1961. to amount to such denial or disclaimer, as would entail forfeiture of tenancy rights and incur the liability to be evicted, the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or

> in a third party. A tenant bonafide calling upon the landlord to of section his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of section 12(1)(c) abovesaid. It is the intention of the tenant, as culled out from the nature of the plea raised by him, which is determinative of its vulnerability."
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> (Emphasis supplied)

30. The Apex Court in the case of J.J.Lal Pvt.Ltd vs. M.R.Muraliand (2002) 3 SCC 98, held as under:

> "A plea taken by the defendant in the written statement can itself be made a ground for allowing relief to the plaintiff, subject to well-known limitations. The plea taken in the written statement should by itself be enough as furnishing a ground for relief to the plaintiff, the plea taken by the defendant does not stand in need of any further pleadings being joined by the party; an issue is framed and put to trial unless the facts of the case show that the parties actually went to trial fully alive to the real issue between them and had an opportunity of adducing evidence, that is, the parties know that the plea taken in the written statement too was the subject matter of trial and could form the basis for relief to the plaintiff. In such case, though the pleadings may be lacking or there may be a failure to frame an issue or a specific issue, the applicability of the law laid down by the Supreme Court in Nagubai Ammal vs. Shama Rao AIR 1956 SC 593 would be attracted."
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> (Emphasis supplied)

31. The ratio of the aforesaid 2 judgments referred to hereinabove unequivocally go to show that if the tenant is apprised of the transfer of title of landlord and if he had acknowledged title of transferee, expressly or impliedly by paying rent to him; then also rule of estoppel comes into operation. The tenant is not permited to approbate and reprobate and challenge relationship of landlord and tenant. That the denial of title in the written statement can also be foundation of decree for eviction. Following the principles of law holding the field, applying the same to the facts and circumstances of the case at hand, it would be clear that the petitioners- tenants have denied title of the plaintiffs- petitioners- landlords, who had taken over landlordship of the premises. It would, thus, be clear that denial of title was not bonafide. It was just to protract the litigation. Both the Courts below have rightly taken a view that in view of denial of title tenants had forfeited right of tenancy and plaintiffs were entitled for possession of the suit premises. No fault can be found with the findings recorded. The findings of facts recorded by the Courts below can very well be supported by evidence on record. The view taken by the Courts below is a reasonable and possible view.This Court, not being a Court of appeal is not expected to reappreciate the evidence.

32. Having said so, it is necessary to take note of the judgment of the Apex Court in the case of **Laxmikant Revchand Bhojwani & anr. vs. Pratapsingh Mohansingh Pardeshi (1995) 6 SCC 576,** in para 9, before considering rival submissions, wherein following observations were made:

> " Before parting with this judgment, we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."

33. Bearing in mind the above observations of the Apex Court and considering concurrent finding of fact recorded by the Courts below, it is very difficult to reach to the conclusion that the impugned order is perverse. Cogent reasons are given by the lower appellate Court while confirming the findings of fact recorded by the trial Court on each and every issue raised in the appeal. The lower appellate Court appreciated oral evidence and

recorded findings of fact and affirmed the findings of facts recorded by the trial Court. No case is made out either in the petition or during the course of hearing to demonstrate that any piece of evidence was not taken into account by the Courts below or that any piece of evidence was misconstrued by the lower appellate Court.

34. In the above view of the matter, petition is without any substance. The same is liable to be dismissed.

35. At this stage, learned Counsel for the petitioner prays for time till 31.3.2007 tovacate the premises. Shri Naik has no objection to grant such time. Accordingly, petitioners are granted time to vacate the suit premises till 31.3.2007 subject to: (i) filing usual undertaking in this Court within one week from today and (ii) on depositing entire arrears of rent till 30.9.2006 on or before 15th October, 2006 and (iii) on paying monthly rent of Rs. 5,000/- (five thousand) on or before 10th of each succeeding month to be adjusted in the future mesne profits to be determined by the competent Court in accordance with law. The udnertaking shall be signed by all adult members of the family/occupants of the house, failing which decree holders shall be entitled to execute decree

in accordance with law.

36. In the result, petition is dismissed with no order as to costs.

(V.C.DAGA,J.)